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IN THE
Supreme Court of the United States
OCTOBER TERM, 1994

CLARENCE ALLEN LACKEY,
Petitioner,
v.
STATE OF TEXAS
Respondent.

Amicus Curiae Brief In Support Of Petitioner Submitted By English Bar Committee Of Human Rights

BRIEF AMICUS CURIAE

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QUESTION PRESENTED

Whether the execution of a death sentence constitutes cruel and unusual punishment under the Eighth Amendment as understood by the Framers if, as a result of inordinate delay not attributable to his own conduct, the condemned inmate is forced to endure nearly two decades on death row, during which time his execution is repeatedly rescheduled.

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On Petition For Writ Of Certiorari
To The Texas Court Of Criminal Appeals

BRIEF AMICUS CURIAE

COMES NOW, the English Bar Committee of Human Rights, and respectfully submits the following *amicus curiae* brief in support of Clarence Allen Lackey's Petition for Writ of Certiorari.

INTEREST OF AMICUS CURIAE

The Human Rights Committee of the Bar of England and Wales regularly appears on behalf of persons whose human rights are endangered. Whether domestic tribunals will receive our *amicus curiae* briefs depends on their domestic rules. It is respectfully submitted that this Court should admit this brief in support of the instant Petition since:

(i) the comity of the common law nations makes the experience of each persuasive to the other;

(ii) the United States Government has ratified the International Covenant on Civil and Political Rights,

effective June 8, 1992, evincing a sincere concern to comply with norms of international law.

II. GROUNDS PRESENTED IN THE BRIEF

The Bar Committee seeks to supply support to the constitutional challenge to Clarence Lackey's long delayed execution as a violation of due process of law and also as cruel and unusual punishment under the American Constitution. *Amicus* respectfully contends that due process of law does not end with pronouncement of the sentence of death, and that cruel and unusual punishment may occur well before the actual execution of a death sentence.

A. A DELAYED EXECUTION IS NOT BY DUE PROCESS OF LAW

1. PRATT & MORGAN

On 2nd November, 1993, the Judicial Committee of the Privy Council (Lords Griffiths, Lane, Ackner, Lowry, Slynn of Hadley and Woolf) delivered a far reaching and landmark judgment in the case of Earl Pratt & Ivan Morgan v The Attorney-General for Jamaica et al. The Judicial Committee had not sat *en banc* -- as a board of seven -- since the 1940s; but this was an exceptional constitutional challenge to the legality of hanging Commonwealth prisoners who had been on death row for more than 5 years. (Philip Sapsford, Queen's Counsel, appeared as a Counsel for the Petitioners, Earl Pratt and Ivan Morgan.)

Lord Griffiths stated, in the course of delivering the judgment:

> "... The death penalty in the United Kingdom has always been carried out expeditiously after sentence, within a matter of weeks or in the event of an appeal, even to the House of Lords, within a matter of

> months. Delays in terms of years are unheard of ..."
> "... It is difficult to envisage any circumstances in which in England a condemned man would have been kept in prison for years awaiting execution. But if such a situation had been brought to the attention of the court their Lordships do not doubt that the judges would have stayed the execution to enable the prerogative of mercy to be exercised and the sentence commuted to one of life imprisonment. Prior to Independence, applying the English common laws, judges in Jamaica would have had the like power to stay a long delayed execution, as foreshadowed by Lord Diplock ... when he said ...: "In such a case, which is without precedent and, in their Lordships' view, would involve delay measured in years, rather than in months, it might be argued that the taking of the condemned man's life was not by due process of law."
>
> "...there were a number of factors which have to be balanced in weighing the delay. If delay is due entirely to the fault of the accused such as an escape from custody or frivolous and time wasting resort to legal procedures which amount to an abuse of process, the accused cannot be allowed to take advantage of that delay for to do so would permit the accused to use illegitimate means to escape the punishment inflicted upon him in the interest of protecting society against crime..."
>
> "A much more difficult question is whether the delay occasioned by the legitimate resort of the accused to all available appellate procedures should be taken into account, or whether it is only delay that can be attributed to the shortcomings of the State that should be taken into account. There is a powerful argument that it cannot be inhuman or degrading to allow an accused every opportunity to prolong his life and

resort to appellate procedures however extended may be the eventual time between sentence and execution. This is the view that currently prevails in some States in the United States and has resulted in what has become known as the death row phenomenon where men are held under sentence of death for many years while their lawyers pursue a multiplicity of appellate procedures ..."

"... in their Lordships' view a State that wishes to retain capital punishment must accept the responsibility of ensuring that execution follows as swiftly as practicable after sentence, allowing a reasonable time for appeal and consideration of reprieve. It is part of the human condition that a condemned man will take every opportunity to save his life through use of the appellate procedure. If the appellate procedure enables the prisoner to prolong the appellate hearings over a period of years, the fault is to be attributed to the appellate system that permits such delay and not to the prisoner who takes advantage of it."

"... Appellate procedures that echo down the years are not compatible with capital punishment.... The death row phenomenon must not become established as a part of our jurisprudence."

"... The total period of delay in this case is shocking and now amounts to almost fourteen years."

2. ENGLISH COMMON LAW

"... there is a formidable case for suggesting that execution after inordinate delay would haveinfringed the prohibition against cruel and unusual punishment to be found In Section 10 of the Bill of Rights

1689..."[1]

The 1689 Bill of Rights was part of English legislation in force in 1727 at the commencement of the reign of George II and applied in and to the American Colonies at that time. An application by a prisoner alleging contravention of the 1689 Bill of Rights in this respect could properly have been made.

It follows that the execution of a prisoner was not an act which could be performed at any time after sentence; it was a process developed by custom and practice for dealing with a condemned prisoner from the moment the death sentence was passed to the moment his body was buried within walls. A defining characteristic of that process was that *time was of the essence*; it had to be carried through every stage without undue delay. See generally Pratt & Morgan.

The "right to life" is the "right not to be deprived thereof except by due process of law." Due process of law does not end with the delivery of judgment in a civil matter or the pronouncement of sentence in a criminal matter; it includes the enforcement of judgments and the carrying out of sentences:

> "... it is possible to imagine cases in which the time allowed by the authorities to elapse between the pronouncement of death sentence and notification to the condemned man that it was to be carried out was so prolonged as to arouse in him a reasonable belief that his death sentence must have been commuted to

[1] Riley v. Attorney General of Jamaica, 1 AC 719, 3 All ER 469 (Privy Council 1983) (Lord Scarman, dissenting, joined by Lord Brightman), majority opinion overruled by Pratt & Morgan v. Attorney General of Jamaica, 2 AC 1, 4 All ER 769 (Privy Council 1993) (*en banc*).

> a sentence of life imprisonment. In such a case, which is without precedent and, in their Lordships' view, would involve delay measured in years, rather than in months, it might be argued that the taking of the condemned man's life was not "by due process of law":

Abbot v. Attorney-General of Trinidad and Tobago (1979) 1 WLR 1342 (opinion of Lord Diplock).

Thus, what was foreshadowed here by Lord Diplock, one of the greatest of English jurists, was the recognition that inordinate delay might mean that the taking of the condemned man's life would not be "by due process of law." Significantly he commented that a case of delay so prolonged as to arouse a reasonable belief that he might be spared was "without precedent." Abbott's case therefore confirms the correct jurisprudential approach that the period and circumstances of delay may be such as to put the taking of the man's life outside the due process of law.

The custom and practice of executing convicted murderers without delay antecedes even the practice of executing them only by hanging. It may be traced back at least as far as 1752, when "An Act for better preventing the horrid Crime of Murder" (25 Geo 2, c37) provided that all persons convicted of murder should be executed on the next day (unless convicted on a Friday in which case execution took place on the Monday). In all other cases where the punishment was death, it followed almost as promptly.

The first edition of Dr. Chitty's treatise on the criminal law, published in 1816, states the position:

> "... As far as the interests of the public are effected, it is certainly desirable that the punishment should follow the sentence with as little delay as possible. The minds of the populace are always disposed to

> separate the idea of punishment from that of guilt, and to look on the criminal merely as a sufferer ... as the only benefit that can be derived from the infliction of death is the terror excited by its example, it should be as immediate as circumstances will allow. If a long delay rises, the spectators look on the execution rather as a terrible sight than the necessary consequence of transgression."

(Vol, 1 "Punishment of Death," at p.783).

In England, the date of execution was fixed by the sheriff for a day in the fourth week after the death sentence was passed. In Scotland, the date of execution was fixed by the court under section 2 of the Criminal Law (Scotland) Act 1830: if sentence was pronounced south of the Forth, it was to be fixed between 15 and 21 days hence, and if north of the Forth, between 20 and 27 days hence. In both England and Wales, the Court of Appeal heard an appeal in a capital case within three weeks of the verdict. If the appeal was unsuccessful a revised execution date was set not less than 14 days or more than 18 days after the day when the appeal was dismissed, in order for the Secretary of State to consider the judgement and to make such other inquiries as were appropriate to inform his decision as to whether the death sentence should be carried out or commuted.

The Royal Commission reported that the average delay in 1950 was six weeks (if there was an appeal) and three weeks if there was not. It considered the possibility of reducing this time even further "to shorten the strain on the prisoner and those about him," but felt that the existing time periods were more than were necessary to enable proper preparations of an appeal and a reprieve petition (Report, paras 752, 755, 763). Any capital case appeal in the House of Lords was expedited, and it was usual for their Lordships to announce any rejection of the appeal at the close of argument and prior to giving reasons, in order to allow the

law to take its course. (By way of example, William Joyce was convicted on 19th September 1945; his appeal was dismissed on the 7th November 1945; their Lordships announced their decision at the conclusion of argument on 18th December, and Joyce was executed before reasons were delivered in February 1946. See Joyce v DPP (1946) AC 347 at 363-64.

The "right" which a condemned prisoner had prior to Independence in Jamaica (1962) was to have his fate decided swiftly. That right could have been asserted by application to the Court of Appeal on the event that hearing of his appeal was being unduly delayed or by prerogative writ in the event that the timetable laid down by the Governor in relation to applications to the Judicial Committee of the Privy Council was being frustrated (*e.g.* by the Registrar of the Supreme Court refusing to supply the "necessary papers"). Mandamus would lie against a prison governor who delayed in carrying out the sentence or against the executive (*e.g.* for failure to appoint a hangman). That there came a point, after inordinate delay, at which a colonial court could order that the death sentence should not be carried out was recognized by the Federal Court of India in Piare Dusadh v. King Emperor (1944) Federal Court Reports 61:

> "It is true that death sentences were imposed in these cases several months ago, that the appellants have been lying ever since under the threat of execution, and that the long delay has been caused very largely by the time taken in proceedings over legal points in respect of the constitution of the courts before which they were tried and of the validity of the sentences themselves. We do not doubt that this court has power, where there has been inordinate delay in executing death sentences in cases which came before it, to allow the appeal in so far as the death sentence

> is concerned and substitute a sentence of transportation for life on the account of the time factor alone, however right the death sentence was at the time when it was originally imposed."

To allow a death sentence lawfully passed to be transformed, by prolonged inaction, into a double sentence (12 years' imprisonment, and then death) would have been regarded as an abuse of the courts on the principles adumbrated in Connelly v DPP (1964) AC 1254.

In 1962, under Jamaica law as "under English law, a convicted prisoner, in spite of his imprisonment, retains all Civil rights which are not taken away expressly or by necessary implication" (Raymond v Honey (1983) AC 1). While condemned men were subject to a more strict regime than other prisoners, devised as that most appropriate to what was assumed to be their imminent death, they did not otherwise forfeit the protection of the common Law and the Bill of Rights (see Conjwayo v Minister of Justice (1992) 2 SA 56, in which the Zimbabwe Supreme Court so held in deciding that restricted exercise periods for prisoners under sentence of death infringed their rights to humane treatment, notwithstanding security considerations). Prisoners under sentence of death could not be assaulted, or starved or psychologically manipulated, or denied access to the Courts. They enjoyed, *de facto*, the right to have their fate promptly determined, as the result of a settled practice by the judiciary and the executive to decide appeals and mercy petitions as quickly as proper deliberation would allow.

This practice was itself a recognition of the fundamental right of the condemned prisoner not to be subjected to anguish for longer than was necessary for final determination of his conviction by the Appeal Court and his sentence by the executive.

3. EUROPEAN JURISPRUDENCE

> "... No one shall be subjected to torture or to inhuman or degrading treatment or punishment..."
>
> Article 3, *European Convention on Human Rights*

The leading European authority on what amounts to "inhuman and degrading treatment" in execution of capital sentences is Soering v United Kingdom (1989) 11 EHRR 439, which applied that description to the practice in the State of Virginia of holding condemned men on death row for 6-8 years, a delay "primarily due to a strategy by convicted prisoners to prolong the appeal proceedings as much as possible" (para 56). The European Commission on Human Rights ruled:

(i) The prohibition is absolute, and enshrines a fundamental value of democratic society now generally recognized as an internationally accepted standard (para 88).

(ii) Treatment is "inhuman" if it causes, not bodily injury, but premeditated prolonged and intense physical *or* mental suffering; and "degrading" if it is such as to arouse in its victims feelings of fear, anguish and inferiority capable of humiliating and debasing them and possibly breaking their physical or moral resistance. In relation to court-ordered punishment, the severity must cause more than the inevitable element of suffering and humiliation, and in this connection account must be taken where there is considerable delay before execution of the punishment, of the sentenced person's mental anguish of anticipating the violence he is to have inflicted upon him (para 100).

(iii) The death sentence may infringe Article 3 by way of the manner in which it is carried into execution in the circumstances of a particular case. Factors to be assessed include (para 108):

(a) Length of delay; although of the prisoner's own making, in using a well-intentioned complex of post-sentence procedures,"the consequence is that the condemned prisoner has to endure for many years the conditions on death row and the anguish and mounting tension of living in the ever-present shadow of death";

(b) Conditions on death row, notably the extra security for condemned men and the "seventy of a special regime" lasting for a protracted period;

(c) The applicant's age and mental state (Soering was aged 18 at the time of the offence).

(iv) "Having regard to the very long period of time spent on death row in such extreme conditions, with the ever-present and mounting anguish of awaiting execution of the death penalty and to the personal circumstances of the applicant" the court concluded that there was a real risk that his treatment would go beyond the severity threshold set by Article 3.

Applying the Soering approach, it becomes apparent that there are, in the instant case, additional factors which have made the Clarence Lackey's treatment inhuman and degrading, notably:

(v) the intense anguish and evident disorientation on three occasions after being informed of a date for

execution;

(vi) being subjected to a prison regime which, *inter alia*, denied them the opportunity for work within the prison, and association with uncondemned prisoners.

These factors, brought into fair balance against the demands of the general interest of the community, establish that the Petitioner's rights to humane treatment have been and continue to be breached.

The torturous "death row phenomenon" recognized by Soering and Pratt & Morgan has been recognized by other courts. In Thomas & Paul v. Trinidad (9 July 1987, unreported), Davis, J., ordered that a sentence of death passed upon the applicants more than 10 years before should be vacated, and that they should be removed from the death cells in the Royal Gaol and treated as persons sentenced to life imprisonment. He was satisfied that:

> "when a mandatory death penalty was provided for long before Independence and the legal complexities which our Constitution introduced, it was never in the contemplation of our lawmakers that a decade, or anything like it, would legally elapse between the passing of a sentence and the execution of the culprit."

The other factors he took into account included the conditions on death row devised on the assumption of speedy execution (the cells "were Intended to be in effect holding-bays where the condemned prisoner was kept for a limited period of time on his way to the gallows"); judicial delays (one judge had taken three years to deliver judgment); the circumstances attendant upon the reading of the execution

warrant, the fact that "a life sentence, in practice, normally means imprisonment for less than 10 years and the applicants have already been incarcerated more than this"; and concluded that "their prolonged incarceration in death row, coupled with the way in which they are treated, amounts to the infliction of cruel and unusual punishment upon them" (transcript, p. 46).

The United States Supreme Court has not pronounced on delayed executions since Furman v Georgia 33 LED 2d 346 (Justice Brennan p 377, 380; Justice Stewart p 390; Justice Marshall, p 394), although Soering has been described in one recent Federal Court case as "an important precedent ... It reflects a persuasive though non-binding international standard." Ahmad v Wigan, 726 F Supp 389 at 414 [E.D. New York].

Soering, much like Pratt & Morgan, focuses upon the consequences of systematic delay, rather than upon the good intentions of the system which allows it or the presumed "wish" of the condemned man (who is hardly in a position to choose freely) to stay alive even if he deploys litigation strategies to do so. It is submitted that the Soering approach is correct. What is overlooked in "blaming" the death row inmate by holding him responsible for appellate delays is that he is doing more than exercising his constitutional or statutory rights to appeal. He should not, in principle, suffer loss or diminution of another of his rights as a consequence. Irrespective of the reasons why appellate procedures are operating slowly, once the point is reached at which the prisoner's suffering exceeds the severity threshold set by the Eighth Amendment his right under that section is infringed.

It is accepted that a condemned prisoner may act so as to waive reliance on a particular period of delay. An obvious example is any time lapse caused by his escape and

recapture, and the conduct of his lawyers (*e.g.* requesting adjournments when the court is ready to proceed, or bringing frivolous corollary proceedings) may similarly require the delay caused by these actions to be discounted. But the duty to minimise the trauma suffered by a prisoner under sentence of death extends to all agents of the State: courts, prison officials, and the like. A collective failure on their part, or a failure by one agency in the system (*e.g.*, by an appellate court which takes cumulatively 14 years to deliver a final judgment) may be sufficient to prolong the delay to the point where it subjects the prisoner to a constitutionally improper degree of suffering. The approach of the Indian Supreme Court to delays in capital cases caused by its own procedures is instructive:

> "(Capital) cases are dealt with speedily by High Courts and are never kept pending longer than two or three months. It is only when they reach this court that the delay occurs. But surely, our inability to devise a procedure to deal expeditiously with such matters of life and death can be no justification for silencing what the Learned Chief Justice has himself so eloquently described as 'the voice of justice and fair play' which demands that so long as life lasts, so long, shall it be the duty and endeavor of this Court to give to the provisions of our Constitution a meaning which will prevent human suffering and degradation."

Javed Hamed Pawala v State of Maharashtra
(1985) 2 SCR 8.

4. THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS

On 8th June, 1992, the Secretary General of the

United Nations received the Instrument of Ratification from the United States Senate of the International Covenant on Civil and Political Rights. The United States was thus bound in international law to ensure that sentence of death is carried out only in accordance with the law and not contrary to the provisions of the Covenant; procedural guarantees therein prescribed must be observed, including the right to a fair hearing, the presumption of innocence, the minimum guarantees for the defense, communication with counsel of his own choosing, trial without undue delay and the right to review by a higher tribunal. The Human Rights Committee of the United Nations has repeatedly ruled that in capital punishment cases, the duty of States is to observe rigorously all the guarantees for a fair trial set out in the Covenant.

The United States Senate made a number of reservations upon ratification, primarily concerning the continued practice of executing minors at the date of their conviction. International law recognises the right of parties to a multilateral treaty to formulate objections to reservations; by early January, 1994 the following countries had deposited with the United Nations objections to the United States' reservations, declarations and understandings:

(a) Finland
(b) Netherlands
(c) Germany
(d) Denmark
(e) France
(f) Norway
(g) Belgium
(h) Italy
(i) Portugal
(j) Spain

International jurisprudence tends to the view that the United States reservations to the death penalty provisions of

the International Covenant are illegal, as they are contrary to the object and purpose of the Treaty. Examining the matter narrowly, it would appear that the United States does not intend to be bound by Articles 6 and 7 of the Covenant so far as the death penalty is concerned.

Article 6 of the International Covenant provides:

"1. Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life.

2. In countries which have not abolished the death penalty, sentence of death may be imposed only for the most serious crimes in accordance with the law in force at the time of the commission of the crime and not contrary to the provisions of the present Covenant and to the Convention on the Prevention and Punishment of the Crime of Genocide. This penalty can only be carried out pursuant to a final judgment rendered by a competent court.

3. When deprivation of life constitutes the crime of genocide, it is understood that nothing in this article shall authorise any State Party to the present Covenant to derogate in any way from any obligation assumed under the provisions of the Convention on the Prevention and Punishment of the Crime of Genocide.

4. Anyone sentenced to death shall have the right to seek pardon or commutation of the sentence. Amnesty, pardon or commutation of the sentence of death may be granted in all cases.

5. Sentence of death shall not be imposed for crimes committed by persons below eighteen years of age and shall not be carried out on pregnant women.

6. Nothing in this article shall be invoked to delay or to prevent the abolition of capital punishment by any State Party to the present Covenant."

Article 7 of the International Covenant provides:

" No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. In particular, no one shall be subjected without his free consent to medical or scientific experimentation."

However, the objecting countries have quite correctly stated that under Article 4(2) there can be no derogation from Articles 6 and 7. It is likely therefore that one of the objecting countries will seek a ruling from the Human Rights Committee of the United Nations as to the effect and legality of the reservations.

CONCLUSION

WHEREFORE, the English Bar Committee of Human Rights urges this Court to grant our motion for leave to file this *amicus curiae* brief and ultimately grant Clarence Allen Lackey's petition for writ of certiorari in order to resolve these important issues of law.

Respectfully submitted,

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